

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

JOHANZ X. SANTOS, ppa, DENISE COLON,	)	C.A. No.: 03- 12210 MLW
DENISE COLON, Individually, JESUS SANTOS,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
BOB'S DISCOUNT FURNITURE; REGENT	)	
HOME DELIVERY; AGNILIZ ACOSTAS;	)	
RAUL SANTOS,	)	
	)	
Defendants.	)	
	)	

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**PLAINTIFF'S OPPOSITION TO DEFENDANT'S  
MOTION TO FILE COUNTERCLAIM LATE**

This case involves a minor who was stuck by a motor vehicle driven by the defendant Raul Santos and owned by Agniliz Acostas. The minor plaintiff stepped into the street in front of an illegally parked Bob's Discount delivery truck. The illegally parked truck obstructed the visibility of the automobile driver and the child was severely injured. He suffers from a head injury and continues to suffer significant cognitive developmental deficiencies.

The plaintiffs oppose the defendant's motion on several grounds. First, pursuant to FRCP Rule 13(a) this defendant has waived its right to now file a counterclaim which arose out of the same occurrence that is the subject matter of the plaintiff's complaint. The plaintiff's filed their complaint on 11/10/03. The defendant filed its answer on 1/23/04 without any counterclaim. Several months went by without the defendant doing anything on this case. The matter was called for a scheduling conference in Boston on 7/28/04 at which time by agreement the matter was transferred to Springfield. The court held another scheduling conference on 9/24/04. The Plaintiffs filed a joint statement with the court that all motions pursuant to Rules 12, 15, 19 and 20 would be filed by November 9, 2004. The defendant did not raise the issue of amending its answer at that time. Discovery commenced including depositions of the defendants. It was not until 12 months after the complaint was filed that the defendant now moves to amend its answer by adding a counterclaim.

The defendant had not engaged in any discovery and has taken a lackadaisical approach to defending this case. The defendants counterclaim is a compulsory counterclaim pursuant to FRCP Rule 13(a). The counterclaim alleges negligence on the part of the minor plaintiff's parents as a result of the underlying accident. This claim arises from the same transaction that gave rise to the plaintiff's claims. The counterclaim

was compulsory and should have been brought by the defendant in its original answer. The defendant failed to raise any such issue and now belatedly seeks to amend its answer. The defendant has waived its right to raise this counterclaim. Moreover at the status conference held on 9/24/04 the court inquired of counsel regarding all outstanding matters and issues and set deadlines accordingly. At no time did this defendant raise the issue of amending its answer by filing a counterclaim.

Finally, the Defendant has failed to state any reason for its delay in seeking this amendment nor has it stated any grounds in support of its motion as required by Federal Rules of Civil Procedure Rule 7(b) and Local Rule 7.1(B)(1). The motion is not only procedurally defective but also lacks any merit.

For all of the above reason the Defendant's motion should be denied.

Respectfully Submitted  
By Their Attorneys,

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**CERTIFICATE OF SERVICE**

I, David P. Angueira, do hereby certify that I have served a copy of the within of Plaintiff's Opposition to Defendant's Motion to File Counterclaim upon the Defendants by mailing same, first class mail, postage prepaid, to all counsel, to wit:

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/s/ David P. Angueira  
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Dated: December 8, 2004